



RCS No.35 of 2021
Nishant + 1 vs. Hanuman + 7
CNR No. MHAM130015132021

ORDER BELOW EXH.44

This application is filed by defendants under **Order XXVI Rule 09 of Code of Civil Procedure, 1908**, for appointment of Court Commission. Suit is for Declaration and Perpetual injunction.

2. It is the contention of defendants that plaintiffs have filed the suit for declaration and permanent injunction on the ground that defendants are creating obstacle over the use of land which is in front of their shop and house. Temporary injunction application filed by plaintiffs has been allowed. It is pleading of plaintiffs that defendants are not owner of plot No. 598, for alleged area and unnecessarily defendants are creating obstacle over their use of way. Therefore, the appointment of Court commissioner to ascertain the actual area of plot of defendants bearing plot No.598, sheet No.7 to reach the actual and factual situation of the location is necessary. Hence, prayed to allow the application.

3. Plaintiffs in reply contended that no specific reason mentioned in the application as to why the appointment of commissioner is necessary. The purpose of defendants is to create evidence by way of the report of Court Commissioner. Hence, prayed to reject the application.

4. Considering the rival submissions of both parties, following points arise for my determination. Findings thereon are given for the reasons stated there-under ;

POINTS**FINDINGS**

1. Whether there is need of appointment of Court Commission for local investigation for the purpose of elucidating any matter in dispute ?

In Negative

2. What order ?

Application is rejected.

REASONS

5. The learned advocate for defendants in support of his contentions placed reliance on the following authorities:-

- 1) **Sulemankhan S/o Mumtajkhan and others V/s. Bhagirathibai Wd/o Digamber Asalmol and another 2014 (4) Mh.L.J., 250,**
- 2) **Kolhapuri Bandu Lakade V/s. Yallappa Chinappa Lakade 2011 (3) Mh.L.J., 348,**
- 3) **Yashwant Bhaduji Ghuse V/s. Vithobaji Laxman Ladekar 2010 (3) Mh.L.J., 3956**

6. The learned advocate for plaintiffs in support of his contentions placed reliance on the following authorities:-

- 1) **Maria Pereira Vs Dolorosa Christina Rodrigues [2015 (1) B C J 589]**
- 2) **Dnyandeo Vithal Salke & Ors Vs Dagdu Kadar Inamdar 2017 (5) ALL MR 104**

7. I have gone through the observations made by the Hon'ble Bombay High Court in above cited rulings.

As to Point No.01 :-

8. Firstly, the basis purpose of appointment of court commissioner is to be seen. Order XXVI Rule 9 of C.P.C. provides for appointment of Court Commissioner for the purpose of elucidation of any matter in dispute. It is the settled principle of law that, the court commissioner cannot be appointed for the purpose of collecting evidence.

9. a) The ruling of **Sulemankhan** cited *supra* relied by defendants is concern in the said suit the dispute was in respect of boundaries, where as in case in hand the dispute is in respect of area of the plot. Therefore, with due respect the said ruling is not applicable in the present case.

b) In the ruling of **Kolhapuri** cited *supra* relied by defendants is concern the Hon'ble Court held that report of Court Commissioner would not be conclusive and if any of parties are aggrieved by the same, such a party would always be entitled to cross examine the Court Commissioner, so as to challenge the veracity of the report. This ratio of the judgment is not in dispute.

c) In the ruling of **Yeshwant** cited *supra* relied by defendants is concern the Hon'ble Court held that Court has discretion to order local investigation. Cases of boundary dispute about identity of lands are instances when a Court should order local investigation. In the present case the dispute is not in respect of boundaries of the plot, it is in respect of area of the plot. Hence, with due respect this ruling is also not applicable in deciding the present application.

d) In the ruling of **Mariya & Dnyandeo** cited *supra* relied by plaintiffs are concerned, in both ruling it is held that the Court

Commissioner cannot be appointed to collect the evidence. There is no dispute in respect of said ratio.

10. In the present case plaintiffs contentions is that defendant's plot area is only 247.5 sq.mt i.e. 1600 sq.ft., but they prepared some documents and now claiming or showing area of their plot is 350.19 Sq.Mt. i.e. 3768 sq.ft., The said fact has been challenged in the present suit. Defendants contention is that if the commissioner is appointed then exact location of their plot may come on the record. If the court allowed the application then the court would require to supply the documents to the Court commissioner. As there is dispute of area of the plot of defendants then which document will be supplied to the Court commissioner would arise. When main dispute is in respect of area then before deciding the question of exact area of the disputed plot, its measurement is not permissible. Under such circumstances when the area of the plot of defendants is not definite, then no purpose would be served by appointing the court commissioner. It shows that defendants are trying to create the evidence through the report of Court Commissioner and such thing is not permitted.

11. Apart from that it is defence of defendants that they have already measured the area of their plot on 11.11.2021 itself through the Deputy Superintendent of Land Record but only task of giving boundary mark is remained due to obstruction of plaintiffs. Still by appointment of court commissioner it appears that, defendants are intending to create the evidence. Under such circumstances, I do not think it fit to appoint the court commissioner in the present matter as it is going to be for the purpose of collection of evidence. Resultantly, I answer point No.01 in the negative.

As to Point No.02 :-

12. As I have already answered point No.01 in negative, I am inclined to reject the application. As the application is simply the effort made by defendants with the use of statutory provision, I am not inclined to lay cost of present application on either party. Hence, I pass following order;

Order

Application is rejected with no order as to cost.

Date:03.09.2022

(Satish G. Gore)
Jt. Civil Judge Junior Division
Dharni.

Certificate

I affirmed that, the contents of this PDF file order are same word to word as per original order.

Name of Stenographer	:	A. S. Pathak,
Court Name	:	Jt. C.J.J.D. & J.M.F.C., Dharni.
Order signed by P.O.	:	03.09.2022.
Order uploaded on	:	05.09.2022.